

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KENNETH HILL and DEPARTMENT OF ENERGY,
SOUTHWESTERN POWER ADMINISTRATION, Muskogee, OK

*Docket No. 99-1915; Submitted on the Record;
Issued April 9, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received an overpayment of compensation in the amount of \$7,475.61 from August 8, 1995 to February 28, 1998; and (2) whether the Office properly found that appellant was with fault in the creation of that overpayment, which was, therefore, not subject to waiver.

On May 16, 1984 appellant, then a 43-year-old electrical lineman, sustained a right inguinal hernia causally related to his federal employment. The Office accepted his traumatic injury claim and authorized appropriate compensation. By decision dated July 24, 1986, the Office granted appellant a schedule award for 100 percent impairment of his right testicle in the amount of \$18,532.80. By decision dated November 28, 1996, the Office found that appellant was totally disabled and authorized ongoing benefits. Effective October 12, 1984, appellant's employment was terminated for the "efficiency of the service."

A February 25, 1998 report completed by the Office of the Inspector General advised that appellant submitted EN-1032 forms dated December 30, 1995 and December 6, 1996 stating that he had a dependant spouse. An EN-1032 form dated November 22, 1997 indicated that his divorce was pending and that he made regular direct payments to his spouse. The inspector general's report found that appellant received compensation benefits at the augmented 75 percent rate. The investigation revealed that appellant's divorce was granted on December 19, 1994 and that a divorce decree was issued on August 8, 1995.

The inspector general's report included copies of appellant's divorce decree dated August 8, 1995 and filed September 18, 1995 and questionnaire forms dated December 30, 1995, December 6, 1996 and November 22, 1997. On the December 30, 1995 and December 6, 1996 forms appellant indicated that he was married.

By decision dated March 9, 1998, the Office preliminarily found that appellant received an overpayment of compensation in the amount of \$9,258.19 and that he was not without fault in creating the overpayment. The Office found that appellant ceased to have a dependent spouse on December 19, 1994 the date his divorce was finalized, but continued to receive compensation at the augmented rate of 75 percent of his weekly pay through February 28, 1998. Effective March 1, 1998, compensation was paid at the regular rate of 66 2/3 percent of appellant's weekly wage.

Subsequently, appellant requested a waiver of the overpayment and a prerecoupment hearing. Appellant submitted an overpayment recovery questionnaire dated March 19, 1998, in which he reported that his sole monthly income was \$1,900.00 in compensation benefits from the Office. He reported that he supported, fully or in part, Betty Wilson and that she was not a relative. Appellant noted his usual monthly household expenses: (1) \$400.00 for rent; (2) \$200.00 for food; (3) \$100.00 for clothing; (4) \$175.00 for utilities; and (5) \$500.00 for miscellaneous expenses. He also noted that he made a \$518.00 monthly loan payment to a federal credit union. His total monthly expenses equaled \$1,893.00. Appellant stated: "To the best of my knowledge I have not been overpaid."

Appellant stated on February 25, 1998 that he borrowed \$11,756.00 to make alimony payments to his wife and that he was making \$350.00 monthly payments on that loan. He also stated that he was prepared to put up his trailer as collateral in order to secure an additional loan and that monthly loan payments for that loan would be \$159.00.

In a statement dated March 19, 1998, appellant asserted that his former wife filed for divorce on January 19, 1994 and that property division issues remained ongoing. He discussed alimony payments he made to his former wife and he alleged great financial hardship. Appellant also submitted a list of payments he allegedly made to his former wife.

Additionally, appellant submitted legal documents relating to his divorce including a decree of divorce dated August 8, 1995 and filed September 18, 1995 and a memorandum opinion dated September 30, 1997, affirming the trial court's decision concerning alimony payments and property division.

On December 15, 1998 an oral hearing was held before an Office hearing representative. At the hearing, appellant testified that his divorce was finalized in April 1998 when he returned to court to settle property issues. He also testified that he became separated from his wife in 1995 and that they filed for divorce in December 1994 or January 1995. Appellant stated that he believed that his divorce was granted in the fall of 1996 but that property division remained contested. He discussed alimony payments and stated that he paid his former wife about \$900.00 monthly for six or eight months.

In questionnaires dated December 8, 1997 and February 12, 1999, appellant denied that he had worked for an employer or that he was self-employed during the previous 15 months. He also denied being married or receiving federal benefits payments.

By decision dated February 23, 1999, the Office hearing representative affirmed the Office's March 9, 1998 preliminary decision finding that appellant had received an overpayment

of compensation and that he was not without fault in creating that overpayment. However, the hearing examiner found that the period of the overpayment ran from August 8, 1995, the date of appellant's divorce decree, until February 28, 1998. The hearing examiner further found that appellant was overpaid \$7,475.61. The hearing examiner stated that the Office would recover the overpayment by deducting \$300.00 from appellant's regular monthly compensation payments.

The Board finds that there was an overpayment of compensation in the amount of \$7,475.61 from August 8, 1995 to February 28, 1998.

The record reveals that appellant received compensation benefits at the augmented rate of 75 percent of his weekly income when he did not have a spouse or other legal dependant.

The Board further finds that appellant is not without fault in the creation of the overpayment and that the overpayment cannot be waived.

Section 8129(b) of the Federal Employees' Compensation Act provides, "Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience."¹ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have been expected to know was incorrect. (This provision applies only to the overpaid individual."²

In this case, appellant knew or should have known that the augmented compensation that he received between September 18, 1995 and February 28, 1998 was paid in error. By his own admission, appellant received compensation at the augmented rate after September 18, 1995, the date his divorce decree was filed. Although legal proceedings relating to property division and alimony continued after August 8, 1995, appellant knew or should have known that he was

¹ 5 U.S.C. § 8129(b).

² 20 C.F.R. § 10.433(a).

legally divorced on that date and, therefore, was not entitled to receive compensation benefits at the augmented rate. Furthermore, appellant incorrectly stated that he had a dependent spouse on forms dated December 30, 1995 and December 6, 1996 submitted to the Office. Both forms clearly stated that only claimants with legal dependants are entitled to receive augmented compensation and provided the definition of a dependant.

Because appellant knew or should have known that he was legally divorced on September 18, 1995 and he continued to assert that he had a dependent spouse on forms dated December 30, 1995 and December 6, 1996, he is with fault in the creation of the overpayment and, therefore, is not entitled to waiver of recovery of that overpayment.

The February 23, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed as modified.

Dated, Washington, DC
April 9, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member